



Psychiatric Patient Advocate Office

*Submission Regarding Bill 103
Independent Police Review Act, 2006*

January 2007

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RIGHTS – EMPOWERMENT – RECOVERY



Psychiatric Patient Advocate Office

Bureau de l'intervention en faveur des patients des établissements psychiatriques

January 31, 2007

Lorenzo Berardinetti, Chair
Standing Committee on Justice Policy
Room 1405, Whitney Block
99 Wellesley Street West
Toronto, ON M7A 1A2

Dear Mr. Berardinetti:

RE: Bill 103 – *Independent Police Review Act, 2006*

Thank you for the opportunity to make an oral presentation to the Standing Committee on Justice Policy regarding Bill 103 – *Independent Police Review Act, 2006*. We believe that the proposed legislation, as it stands, would not result in a credible, independent and fair review process that could be relied upon by the client group whom we serve. The attached submission and its recommendations, if adopted, would strengthen the proposed legislation by heightening accountability and transparency in the public complaints process and ensuring that vulnerable individuals could make complaints in good faith that they will be properly addressed.

We are pleased that the government of Ontario is considering establishing an independent police review system in Ontario. Unfortunately, Bill 103 will not create the independent process envisioned by most Ontarians nor will it enshrine necessary and needed civilian oversight and accountability in the review process. You will note that our recommendations focus on ways to strengthen the proposed police complaints system and bring justice to those who are most marginalized and vulnerable.

Failure to respond adequately to legitimate complaints of police misconduct fails not only the wronged person but the public, the police and the government. We believe that it is necessary to balance access to the complaints system against the need to ensure that police can do their jobs, unimpeded by concerns that their actions will come under unwarranted scrutiny. Access to independent review is also critical to ensuring that the complaint process can, itself, be scrutinized for fairness and accountability.

As the proposed legislation represents an opportunity to shape the delivery of one of our most important civic services, we urge you to seriously consider adopting our recommendations.

If our office can be of any assistance or provide additional information, please contact me at (416) 327-7004.

Sincerely,

David Simpson
Acting Director

c.c. Dawn Ogram
Assistant Deputy Minister
Corporate and Direct Services, MOHLTC

SUMMARY OF RECOMMENDATIONS

THE NEED FOR AN INDEPENDENT CIVILIAN BODY – Police Should Not Investigate Police

Recommendations:

- Allow the IPRD to be a truly independent civilian body in Bill 103 in order to restore credibility to the police complaints process in Ontario.
- Change the legislation to ensure complaints are treated equally and remove any references to distinctions based on the nature of the complaint, such as misconduct versus policies and services.
- Amend section 26.2 of Bill 103 to expand the functions of the IPRD to include the review of “all” complaints.
- Require the IPRD to have jurisdiction over all police complaints by striking out the word “referral” in section 59(2).

ONTARIO CIVILIAN POLICE COMMISSION

Recommendations:

- Amend Part II of the *Police Services Act* to create open and transparent recruitment and appointment processes for Commission members.
- Establish criteria for membership on the Commission based on merit while reflecting the gender balance and diversity of Ontario.
- Members of the Commission should not be either current or former police officers or police staff.

THE INDEPENDENT POLICE REVIEW DIRECTOR

Establishment of the IPRD

Recommendations:

- Amend section 26.1 to guarantee the independence of the IPRD by making it accountable to the Legislative Assembly, not the Attorney General.
- Amend section 26.1(5) to prohibit former police officers or police staff from being employees of the IPRD.
- Require the IPRD to establish regional offices by replacing the word “may” with “shall” in section 26.1(7)
- Amend section 26.1(8) to include the provision of detailed information about the nature of complaints, identification of the police service involved and the outcomes in the annual report.
- Release the annual report publicly within 90 days of receipt by the Attorney General.

Investigation Powers

Recommendation:

- Amend section 26.6(1) to allow investigators to enter and search a police station or detachment of that police force without notice by removing the phrase “on notice to the chief of police or detachment commander of a police force” and deleting section 26.6(6).

Review of Systemic Issues

Recommendations:

- Require the IPRD to examine and review systemic issues of its own motion in section 57.
- Authorize the IPRD to follow-up and enforce any recommendations he or she makes respecting matters of a systemic nature.
- Require the IPRD to make available to the public its recommendations respecting systemic issues.

ACCESS TO COMPLAINTS

Third Party Complaints

Recommendations:

- Clarify the legislation to permit third parties to make police complaints and require these complaints to be reviewed by the IPRD.
- Allow complainants to designate a person of choice to support them throughout the complaints process.
- Provide definitions for the terms “agent” and “person.” The word “person” should include community organizations and advocacy groups.
- Permit police officers to make complaints to the IPRD by deleting sections 58(2)(4) and (5).
- Include whistleblower protections to safeguard the rights of individuals who makes a police complaint.

Allow Written or Verbal Complaints

Recommendations:

- The addition of a provision in Bill 103 addressing the importance of and need for accessibility and accommodation.
- The inclusion of a section in the legislation specifying that complaints to the IPRD may be submitted either in writing by mail, fax or email, or verbally by telephone or in person.
- Require that translators be available to all complainants, as required and at no additional cost, throughout the complaints process.

- Ensure that education and outreach programs are provided in multiple languages and means of communication, in addition to being culturally sensitive.

Power of the IPRD to Refuse Complaints

Recommendations:

- Amend the provisions regarding the IPRD's ability to dismiss complaints in section 60 to say a complaint may be dismissed only if a claim is clearly without merit and there is no reasonable likelihood that further investigation will establish merit.
- If the refusal scheme is not changed as suggested by the PPAO, definitions should be provided for the terms "frivolous and vexatious," "made in bad faith" and "public interest."
- Create an appeals process for complainants whose claims are refused by the IPRD.

Education

Recommendations:

- The legislation should mandate regular education of police officers to ensure that they interact appropriately with persons with mental illness and are sensitive to the stereotypes and stigma that many consumers live with on a daily basis.
- The establishment of various advisory committees for vulnerable populations, such as mental health consumers, to assist with the education of police officers and the public, in addition to analyzing systemic issues endemic to these populations and providing advice to the IPRD.
- Amend section 58(4) to require the posting of information about the complaints process at various locations, including courthouses, police stations, hospitals and social agencies.
- Mandate individual police services to participate in the education of the public respecting the complaints system.
- The IPRD, police forces and stakeholders should collaborate on the development of a public education plan respecting complaints for the local community.
- Include a provision in the legislation to require sufficient amounts of funding to ensure the education of the public and the police about the complaints system.

LIMITATION PERIODS

Recommendations:

- Amend section 60(2) to extend the limitation period to file a police complaint to two years while maintaining the power of the IPRD to accept late complaints if the delay was incurred in good faith and no substantial prejudice was caused to the other parties.

- Amend section 71(1) to extend the amount of time from 30 to 120 days in which complainants may ask the IPRD for a review of a decision.

REVIEW AND INVESTIGATION OF COMPLAINTS

Review of Policy Complaints

Recommendations:

- Amend sections 63(1), 64(1) and 65(1) so policy complaints must be investigated, as opposed to reviewed.
- Omit sections 63(3) and 64(3) respecting time extensions for chiefs of police or detachment commanders to make and disseminate policy decisions.
- Make decisions respecting policy complaints available to the public.

Informal Resolution

Recommendations:

- Amend section 66(4) so the IPRD, not the chief of police, suggests the use of informal resolution.
- A written acknowledgement indicating that the complainant was informed of the complaint process should be obtained prior to engaging in informal discussions.
- Provide a definition of the term “not of a serious nature.”
- Employ neutral mediators without any ties to the police to conduct mediations.
- Amend section 66(6) to extend the amount of time from 30 to 120 days in which complainants must decide whether they wish to ask the IPRD to review the decision to resolve the matter informally.
- Require the recording of statistics respecting the numbers and outcomes of informal resolution.
- Oblige the IPRD to provide legal advice and representation to complainants.

Expunging Employment Records

Recommendation:

- Extend the time from two to five years in which entries to a police officer’s employment record respecting misconduct or unsatisfactory work experience is expunged by changing sections 66(11), 69(13), 76(12).

HEARINGS AND DECISIONS

Recommendations:

- Substitute the term “clear and convincing evidence” with “balance of probabilities” in section 84.

- Make all hearing decisions available to the public by deleting the phrase “in the manner that he or she (the chief of police) considers appropriate in the circumstances” in section 86(1).
- Include a provision permitting the anonymization of the complainant’s name and identifying information in decisions.
- Permit hearings to be held “in camera” at the request of the complainant.
- Provide legal advice and legal representation to complainants.

RIGHT OF APPEAL

Recommendations:

- Revise section 88(1) by allowing all decisions of the Commission to be appealed to the Divisional Court.
- Clarify section 88(2) to state that an appeal to Divisional Court may be made on either a question of fact or law.

PERFORMANCE AUDITS

Recommendations:

- Amend section 91 to say that performance audits of boards are required annually and the results made available to the public.
- Amend section 92 to say that performance audits of the IPRD are required annually with respect to its administration of complaints made by members of the public.

OFFICE OF THE OMBUDSMAN

Recommendation:

- Amend section 97 to enable the *Ombudsman Act* to apply to the *Police Services Act*.

OFFENCES

Recommendations:

- Increase the maximum fine for contravening the legislation in sections 79(3) and 81(3) from \$2,000 to \$25,000.
- Omit sections 79(4) and 81(4) respecting the necessary to obtain the consent of the Attorney General to institute a prosecution for offences.

POLICE IDENTIFICATION

Recommendation:

- Create a requirement that police officers are obligated to wear nametags of a sufficient size to ensure they are readily identifiable.

REVIEW OF THE LEGISLATION

Recommendations:

- Include a section in the legislation requiring an initial review of the implementation and effectiveness of the changes to the complaint system within two years of the effective date and every three years thereafter.
- Stipulate that the person responsible for undertaking such reviews be chosen by the Executive Council.
- Require that the legislative reviews involve consultations with stakeholders.
- Reports resulting from reviews be completed within 120 days of the review date and presented to the Legislative Assembly and made available to the public forthwith.

Submission of the Psychiatric Patient Advocate Office Respecting Bill 103, *Independent Police Review Act, 2006*

INTRODUCTION

The Psychiatric Patient Advocate Office (PPAO) provides independent and confidential advocacy services and rights advice to consumers of and those seeking access to psychiatric services. We work to empower mental health consumers to make informed decisions about their care, treatment and legal rights.

Our vision is that persons with mental illness in Ontario be treated with dignity and respect, that their legislated rights and entitlements be upheld at all times, and they be actively involved in decisions affecting their life, care, and treatment. We believe in the autonomy of all people and in each person's right to make informed choices.

Many consumers of mental health services inform our office of alleged police misconduct, but fail to complain formally out of fear of reprisal by the police and frustration with the existing complaints process. Multiple criticisms have been levied against the current system under the *Police Services Act*, such as: it is not independent; it is not transparent; it encourages retaliation against complainants; it lacks credibility; and it is slow to respond to complaints. These challenges and barriers are compounded for mental health consumers. They complain that the system is dismissive of complaints lodged by individuals with a mental health "history" while others say they are discouraged from filing complaints or that their complaints are not investigated fully and fairly. Due to the vulnerability and discrimination of many mental health consumers, there is a profound power imbalance between consumers and the police, allowing particular police officers to mistreat consumers with little or no consequence.

Failure to respond adequately to legitimate complaints of police misconduct fails not only the wronged person but the public, the police and the government. The current police complaints process does not have the confidence of mental health consumers and their families. The PPAO is also sceptical that the proposed changes in Bill 103, the *Independent Police Review Act, 2006*, represent a meaningful improvement. We urge the Standing Committee on Justice Policy to consider our analysis and recommendations respecting Bill 103 as a means of bringing accountability, fairness, and transparency to the police complaints process.

THE NEED FOR AN INDEPENDENT CIVILIAN BODY – Police Should Not Investigate Police

The fundamental flaw with both the current complaints process and the process articulated by Bill 103 is the lack of independence and civilian oversight. Many people, including consumers, are reluctant to lodge complaints regarding alleged police

misconduct because they do not have faith in a process that permits police officers to investigate other police officers. The process is perceived as being designed to protect the police instead of the public.

Many individuals with a mental illness have either had a less than positive experience with the police or their illness causes them to fear both the police and the authority they represent. The reason for this being that the police are often involved in taking consumers to the hospital, contrary to their wishes. As a result, consumers may be reluctant to make a formal complaint about police conduct, fearing that the police may simply bring them to the hospital because the complaint constitutes “part of their illness.”

In April 2005, Justice Patrick LeSage released a report regarding the findings and recommendations based on his thorough review of the police complaints system (the LeSage Report). The number one recommendation was the creation of an independent civilian body to administer the public complaints system in Ontario.¹

The Attorney General of Ontario, Michael Bryant, made the following comments to the Legislative Assembly with respect to Bill 103:

Mr. LeSage’s recommendations included establishing a new, independent civilian body to administer the police review system in Ontario, and we propose to do that in this bill. The independent civilian body, led by an independent police review director, would be responsible for receiving complaints and then determining, on a case-by-case basis, who would investigate the complaint: the independent civilian body itself, the police service affected or another police service.²

In the opinion of the PPAO, however, the proposed legislation does not represent a significant change from the current regime and it is not independent. Although an Independent Police Review Director (IPRD) is established to deal with complaints, there is no guarantee of an independent investigation because the IPRD can refer complaints to the police who will investigate themselves. As stated by Attorney General Bryant, the IPRD must ensure that every complaint is either retained and dealt with by the IPRD or referred to the police. The PPAO believes the potential exists for the IPRD to refer the majority of cases to police forces due to funding and external pressures.

Bill 103 also endorses a two-tiered system where different procedures for complaints applying to officer conduct versus policies and services. The PPAO recommends that all complaints should be handled in the same way. Policy complaints are as important as misconduct and work performance complaints as policies can potentially affect the lives of many people. ARCH Disability Law Centre, a not-for-profit speciality legal clinic dedicated to defending and advancing the equality rights of persons with disabilities, agrees that there should not be a distinction between conduct and policies as “the

¹ The Honourable Patrick LeSage, Q.C., *Report on the Police Complaints System in Ontario* (LeSage Report), April 22, 2005, <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/LeSage/en-fullreport.pdf>, p.66

² Hansard, Debates of the Legislative Assembly of Ontario, October 16, 2006, http://www.ontla.on.ca/hansard/house_debates/38_parl/Session2/L107A.htm#PARA552.

conduct of officers is often a reflection of a policy within the police services.” ARCH used the following example to illustrate their point:

For example, we have heard of persons with mental health disabilities who attempted to make complaints about the use of restraints by officers. When the person attempted to make a complaint she was advised that it was the policy of the police service to restrain all persons who were in mental health crisis and the police station refused to take the person’s complaint.³

Any new complaints process must be accessible, available and accountable to the people that it serves. To bring credibility to the police complaints process and to ensure the complaints process will be seen by all stakeholders as fair and effective, the PPAO recommends that the IPRD truly be an independent civilian body.

Recommendations:

- Allow the IPRD to be a truly independent civilian body in Bill 103 in order to restore credibility to the police complaints process in Ontario.
- Change the legislation to ensure complaints are treated equally and remove any references to distinctions based on the nature of the complaint, such as misconduct versus policies and services.
- Amend section 26.2 of Bill 103 to expand the functions of the IPRD to include the review of “all” complaints.
- Require the IPRD to have jurisdiction over all police complaints by striking out the word “referral” in section 59(2).

ONTARIO CIVILIAN POLICE COMMISSION

Part II of the *Police Services Act* authorizes the Lieutenant Governor in Council to appoint members of the Ontario Civilian Commission on Police Services (whose name will be changed to the Ontario Civilian Police Commission under Bill 103). Despite the fact that the LeSage Report favoured a body of independent adjudicators to preside over hearings, no substantive changes were made to Part II of the proposed legislation.⁴

The PPAO believes that the neglect to specify the qualifications of members of the Commission is a major oversight considering the critical role played by members. It is submitted that the appointment of Commission members is a politicized process. Instead, persons should become members on the basis of their relevant experience and recruitment should be an open and transparent process. Members should also not be either current or former police officers or police staff. The composition of the Commission should reflect the gender balance and diversity of Ontario. A body of competent and skilled members will only serve to enhance the efficiency, quality and expertise of the work of the Commission.

³ ARCH Disability Law Centre, *Written Submission to the Standing Committee on Justice Policy on Bill 103, AN Act to Establish an Independent Police Review Director and create a new public complaint review process by amending the Police Services Act* (ARCH Submission), January 30, 2007, p.6.

⁴ LeSage Report, p.80.

Recommendations:

- Amend Part II of the *Police Services Act* to create open and transparent recruitment and appointment processes for Commission members.
- Establish criteria for membership on the Commission based on merit while reflecting the gender balance and diversity of Ontario.
- Members of the Commission should not be either current or former police officers or police staff.

THE INDEPENDENT POLICE REVIEW DIRECTOR

Establishment of the IPRD

Instead of being appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General, as outlined in section 26.1 of the proposed legislation, the IPRD should be responsible to the Legislative Assembly. The PPAO would support any move to increase the autonomy of the IPRD as it would provide him or her with the necessary independence to work without interference or the potential of real or perceived conflict of interest.

Section 26.1(5) does not permit employees of the IPRD to be police officers. The PPAO is in agreement with this restriction but feels it should be strengthened to preclude former police officers from being employees. Our rationale is that former police officers may feel obligated to protect those officers being investigated due to their similar and shared experiences.

Ease of access to the complaints system is crucial if the system wishes to be credible to all residents of the province, irrespective of geography. The LeSage Report acknowledged the need to recognize the geographic diversity of Ontario.⁵ However, section 26.1(7) of Bill 103 merely says the IPRD “may” establish regional offices. As complaints regarding alleged police misconduct are generated throughout the province, it is important to establish regional offices across Ontario. Many mental health consumers are in receipt of financial assistance from the Ontario Disability Support Program and would not have the necessary funds to travel outside their local area if they needed to meet with the IPRD or attend a hearing.

According to section 26.1(8) of the proposed legislation, the IPRD shall file an annual report with the Attorney General “on the affairs of the office” of the IPRD. The PPAO recommends that the report also contain detailed information concerning the nature of the complaints, the police service involved and the resolution. The report should be released to the public within 90 days of receipt by the Attorney General.

⁵ LeSage Report, p.66.

Recommendations:

- Amend section 26.1 to guarantee the independence of the IPRD by making it accountable to the Legislative Assembly, not the Attorney General.
- Amend section 26.1(5) to prohibit former police officers or police staff from being employees of the IPRD.
- Require the IPRD to establish regional offices by replacing the word “may” with “shall” in section 26.1(7)
- Amend section 26.1(8) to include the provision of detailed information about the nature of complaints, identification of the police service involved and the outcomes in the annual report.
- Release the annual report publicly within 90 days of receipt by the Attorney General.

Investigation Powers

Section 26.6(1) of Bill 103 limits the authority of investigators appointed by the IPRD to enter and search a police station or detachment of that police force by requiring investigators to give notice to the chief of police or detachment commander. Investigators may obtain an order authorizing a search without notice of police premises by appearing before a justice of the peace or provincial judge in specific circumstances as outlined in section 26.6(6).

The PPAO submits that investigators should not be constrained in the course of their investigations by being forced to obtain an order from a justice of the peace or a judge. The police should not be hiding information or refusing to cooperate with investigators so there should be no need for prior notice of a search.

Recommendation:

- Amend section 26.6(1) to allow investigators to enter and search a police station or detachment of that police force without notice by removing the phrase “on notice to the chief of police or detachment commander of a police force” and deleting section 26.6(6).

Review of Systemic Issues

The IPRD has the ability, under section 57 of Bill 103, to “examine and review issues of a systemic nature” pertaining to public complaints and make recommendations to the Solicitor General, the Attorney General, chiefs of police, boards or any other person or body.

While the PPAO supports the examination and review of systemic issues, we are concerned that this power will be akin to a toothless tiger if the IPRD is not required to investigate systemic issues of its own motion and if he or she does not have authority to enforce its recommendations. Any recommendations should also be made available to the public.

Recommendations:

- Require the IPRD to examine and review systemic issues of its own motion in section 57.
- Authorize the IPRD to follow-up and enforce any recommendations he or she makes respecting matters of a systemic nature.
- Require the IPRD to make available to the public its recommendations respecting systemic issues.

ACCESS TO COMPLAINTS

Third Party Complaints

The PPAO is pleased that Bill 103 removes the language employed in the current legislation where only the person “directly affected” by the alleged police misconduct may lodge a complaint. That being said, there is a lack of clarity in Bill 103 respecting third party complaints.

Section 58(1) of the proposed legislation states “any member of the public” may make a complaint to the IPRD while section 58(3) goes on to say a complainant may act through an “agent.” However, section 60(4) permits the IPRD “not to deal” with a complaint about a policy of or service provided by a police force if the policy or service did not have a “direct effect” on the complainant. Section 60(5) proceeds to limit the instances where the IPRD may decide to deal with a complaint made by certain “persons.”

There is a pressing need to allow third party complaints. The PPAO has heard of many complaints that go unchecked simply because the individual does not have the capacity to make a complaint in their own right. For example, individuals with dementia, acquired brain injuries, developmental disabilities, addictions or serious mental illnesses may experience an abuse but not be able, because of their illness or disability, to pursue a complaint to the very body that is supposed to protect their rights.

Many consumers may be in contact with the police more than the average citizen and are fearful of bringing a complaint given the possibility of future interaction with the officer complained of. In smaller communities, some consumers may be well acquainted with the offending officers and be reluctant to file a complaint against an officer with whom they have regular contact.

Consumers may not always recall all the details surrounding their interaction with police. They may not remember an officer’s badge number, for instance. On the other hand, friends, family members or staff at community organizations who were either present during the incident or made aware of the details immediately afterwards, are in a better position to assist consumers.

Some consumers may be transient and do not have a fixed or permanent address, making it difficult to receive correspondence or to be kept informed of the progress of their complaint. Allowing a third party to have access to some of the information or allowing

them to “designate” a contact person would take care of some of these concerns. All too often, complaint resolution processes are abandoned simply because contact with the client is lost, resulting in many legitimate complaints not being investigated or resolved.

Individuals must be given the opportunity to have a person of choice to provide support and assist with their complaint from initiation to resolution. Examples of such persons include family members, advocates, peer support workers, friends and legal counsel. Many consumers would appreciate having this support as the process may prove stressful, intimidating and overwhelming. This additional stress may have an impact on their mental health or their ability to sustain the energy to see their complaint through to resolution.

It is the PPAOs position that Bill 103 should be unambiguous about the right of third parties to lodge complaints. Consequently, the aforementioned sections should be amended for the sake of consistency and definitions should be included for the words “agent” and “person” to prevent confusion. A person should be defined to include community organizations and advocacy groups. Peer support workers should be hired and trained to assist individuals making a complaint.

The PPAO also believes that police officers and police staff should not be prohibited from bringing complainants, as per section 58(2) of the proposed legislation. The police should be permitted to make complaints as they are in a unique position to be aware of possible wrongdoings committed by other officers or resulting from the egregious policies of police forces.

Whistleblower protections should also be put in place to safeguard the rights of an individual who has the courage to step forward to report inappropriate police behaviour and policies.

Recommendations:

- Clarify the legislation to permit third parties to make police complaints and require these complaints to be reviewed by the IPRD.
- Allow complainants to designate a person of choice to support them throughout the complaints process.
- Provide definitions for the terms “agent” and “person.” The word “person” should include community organizations and advocacy groups.
- Permit police officers to make complaints to the IPRD by deleting sections 58(2)(4) and (5).
- Include whistleblower protections to safeguard the rights of individuals who makes a police complaint.

Allow Written or Verbal Complaints

The complaints process needs to be as simple as possible to make it accessible to all Ontarians. At present, complaints regarding alleged police misconduct must be made in writing. Bill 103 is silent about the ways in which a complaint may be submitted to the IPRD. It is assumed that the procedural rules established by the IPRD, pursuant to section 56(2) of Bill 103, will set out these details.

The existence of a writing requirement effectively bars complaints and makes the system inaccessible to those with special needs. For instance, alleged victims who are functionally illiterate, unable to communicate in either English or French, or have a visual impairment are discouraged from making a complaint despite the injustice they have experienced. Consequently, an additional burden may be imposed on consumers of mental health services who already experience stigma, discrimination and prejudice associated with their illness when making complaints.

ARCH made the following recommendations about accommodation, with which the PPAO agrees:

The onus should be on the civilian review body to ensure that all accommodations are in place once a person's disability has been identified. One possible way of achieving this may be to have a system where accommodation needs are identified at the point of filing a complaint and a complaint file manager would then ensure that the claimant's needs are accommodated throughout the entire complaint process. Key to this is understanding that there is a great variety of potential accommodations. Accommodating the needs of the individual is consistent with the spirit of the *Accessibility for Ontarians Act, 2004* and Canadian human rights jurisprudence.⁶

The LeSage report specifically noted the linguistic and cultural diversity in the province and recommended that appropriate access be given to the complaints process in light of this fact.⁷ As Ontario is a multi-cultural society, service provision in languages other than the two official languages must be considered. This could include (at no additional cost to the complainant), the ability of the office of the IPRD to communicate with people in all languages, complaint forms and all other written materials being made available in a person's language of choice and proceedings being conducted in the individual's first language. Education and outreach programs must also take the language, communication and cultural needs of individuals into account.

Recommendations:

- The addition of a provision in Bill 103 addressing the importance of and need for accessibility and accommodation.
- The inclusion of a section in the legislation specifying that complaints to the IPRD may be submitted either in writing by mail, fax or email, or verbally by telephone or in person.
- Require that translators be available to all complainants, as required and at no additional cost, throughout the complaints process.
- Ensure that education and outreach programs are provided in multiple languages and means of communication, in addition to being culturally sensitive.

⁶ ARCH Submission, p.8.

⁷ LeSage Report, p.66.

Power of the IPRD to Refuse Complaints

The IPRD is afforded broad powers to refuse to deal with public complaints pursuant to section 60 of the proposed legislation. For example, if the IPRD is of the opinion that the complaint is frivolous, vexatious, made in bad faith or not in the public interest, the IPRD may decide not to deal with the complaint. Where the IPRD chooses not to pursue or refer a complaint, written reasons must be provided to the complainant and the chief of the police force to which the matter relates.

The PPAO is concerned that meritorious complaints will be dismissed for reasons of administrative efficiency. Unfortunately, as the proposed legislation currently reads, complainants have no mechanism of appeal if the IPRD rejects their complaint. Thus, the PPAO recommends that complaints be dismissed only if the complaint is clearly without merit and there is no likelihood that further investigation will establish that the claim has merit. Also, complainants should have a right of reconsideration by the IPRD, a right of appeal to the Ontario Civilian Police Commission and, as a last of resort, a right to appeal to the Ombudsman.

If the proposed legislation is not amended to reflect our recommendations, at a minimum, definitions should be provided for the terms “frivolous and vexatious,” “made in bad faith” and “public interest” to provide clarity and guidance for all the relevant parties. Bill 103 gives authority to the IPRD to define “frivolous and vexatious” and “made in bad faith” in the regulations but, given their importance, these definitions should be included in the statute itself.

Recommendations:

- Amend the provisions regarding the IPRDs ability to dismiss complaints in section 60 to say a complaint may be dismissed only if a claim is clearly without merit and there is no reasonable likelihood that further investigation will establish merit.
- If the refusal scheme is not changed as suggested by the PPAO, definitions should be provided for the terms “frivolous and vexatious,” “made in bad faith” and “public interest.”
- Create an appeals process for complainants whose claims are refused by the IPRD.

Education

Education is a powerful tool to effect social change. People fail to understand that many consumers of mental health services either are fearful of or do not trust the police. This trust must be re-established and one of the easiest ways to restore trust is to have police officers undergo regular education on issues relating to mental illness, mental health legislation and patients’ rights. A culture of understanding and acceptance of mental illness is essential if we are to be an inclusive and caring community, not just for the police, but for all members of the community.

The PPAO recommends the establishment of various advisory groups regarding vulnerable populations (for example, mental health, disability, youth, women and First Nations) to assist with the education of police officers and the public, in addition to analyzing systemic issues endemic to such groups and providing advice to the IPRD.

Education for consumers, families, service providers, advocates and other stakeholders regarding the police complaints process, how to access it and how to make a complaint is essential if the process is to work and hold people accountable for their actions. The LeSage report acknowledged that public education on the complaints system has been virtually non-existent for many years but is critical to fostering understanding and public confidence.⁸ People need to know their rights before they can exercise their rights.

Although section 58(4) of Bill 103 says the IPRD shall provide publicly accessible information about the public complaints system and arrange for the provision of assistance to the public, it does not provide any details as to how this will be accomplished nor does the government commit to any public funding. One possible way to advise the public of the complaints system is by posting information at courthouses, jails, police stations, social agencies and hospitals.

The PPAO also supports the recommendation in the LeSage Report that individual police services must also participate in educating the public regarding the complaints system.⁹ Each police force should appoint officer(s) to disseminate information to the public and respond to public inquiries about complaints.

Recommendations:

- The legislation should mandate regular education of police officers to ensure that they interact appropriately with persons with mental illness and are sensitive to the stereotypes and stigma that many consumers live with on a daily basis.
- The establishment of various advisory committees for vulnerable populations, such as mental health consumers, to assist with the education of police officers and the public, in addition to analyzing systemic issues endemic to these populations and providing advice to the IPRD.
- Amend section 58(4) to require the posting of information about the complaints process at various locations, including courthouses, police stations, hospitals and social agencies.
- Mandate individual police services to participate in the education of the public respecting the complaints system.
- The IPRD, police forces and stakeholders should collaborate on the development of a public education plan respecting complaints for the local community.
- Include a provision in the legislation to require sufficient amounts of funding to ensure the education of the public and the police about the complaints system.

⁸ LeSage Report, p.60.

⁹ LeSage Report, p.67.

LIMITATION PERIODS

Both the current legislation and Bill 103 stipulate that a person can only bring a complaint within six months of the alleged misconduct although an extension may be granted in certain circumstances.

It is the position of the PPAO that the current and proposed legislation contravenes the general limitation period of two years for most civil actions found in the *Limitations Act, 2002*. Although a time extension is permitted in limited circumstances, it is not guaranteed but discretionary.

A short limitation period is particularly onerous for consumers of mental health services. Due to the cyclical nature of many mental illnesses, some clients may not be able to assert their rights for an extended period of time. Due to the pervasive stigmatization and lack of respect for the rights of consumers, some victims may not have realized that they suffered an injustice. Others may have realized that their rights were violated but were too scared or vulnerable to take action out of fear of retaliation or concern that it could impact on their level of and access to services and supports in the future. Thus, the short timeframe in Bill 103 precludes many individuals from exercising their rights.

The PPAO supports the granting of extensions wherever it can be shown that extenuating circumstances existed that require flexible interpretation of the statutory limitation period to ensure that consumers of mental health services are not denied access to the police complaints process.

There are other provisions in Bill 103 with very short appeal periods. For instance, section 71(1) says if a complaint is found to be unsubstantiated or not of a serious nature, the complainant may ask the IPRD to review the decision. For the reasons cited above, the PPAO recommends that this time period be extended to 120 days.

Recommendations:

- Amend section 60(2) to extend the limitation period to file a police complaint to two years while maintaining the power of the IPRD to accept late complaints if the delay was incurred in good faith and no substantial prejudice was caused to the other parties.
- Amend section 71(1) to extend the amount of time from 30 to 120 days in which complainants may ask the IPRD for a review of a decision.

REVIEW AND INVESTIGATION OF COMPLAINTS

Review of Policy Complaints

Complaints referred by the IPRD which are considered to be of a policy nature under sections 63(1), 64(1) and 65(1) of Bill 103 need only to be “reviewed” by the police. The chief of police, detachment commander or Commissioner responsible for the review “shall take any action, or no action in response to the complaint as he or she considers

appropriate.” Complaints reviewed by the chief of police or detachment commander may extend the 60-day timeline afforded to arrive at a decision and prepare written reasons merely by notifying the complainant before the expiry of the 60-day period.

The PPAO is troubled by the lower standard of assessment for policy matters. It undermines confidence in the system as there is no positive obligation on police beyond a review.

We are also disappointed with the ability of the chief of police or detachment commander to prolong the 60-day timeline without any upper limits on the extension. The PPAO recommends that this extension be deleted in order to discourage delay. Further, to increase accountability and transparency, the PPAO suggests that decisions respecting policy complaints be made available to the public.

Recommendations:

- Amend sections 63(1), 64(1) and 65(1) so policy complaints must be investigated, as opposed to reviewed.
- Omit sections 63(3) and 64(3) respecting time extensions for chiefs of police or detachment commanders to make and disseminate policy decisions.
- Make decisions respecting policy complaints available to the public.

Informal Resolution

Sections 66(4) through (12) of Bill 103 outline an informal resolution scheme. Pursuant to section 66(4), at the conclusion of an investigation, if the chief of police believes there was misconduct or unsatisfactory work performance but it was “not of a serious nature,” the chief of police may informally resolve the matter if both the complainant and officer consent to the proposed resolution. Informal resolution can also be utilized if the IPRD retains a complaint about a police officer’s conduct, as per sections 68(6) and (7).

The PPAO is concerned about the power imbalance between the parties. Although the consent of the complainant is required for informal resolution, the complainant may feel compelled to agree for fear that complaint will be otherwise rejected. Forced mediation can also have the effect of re-victimizing the complainant or replicating the injustices they have already experienced. Accordingly, several changes should be made to this scheme. First, the IPRD, not the chief of police, should be the one to suggest the use of informal resolution. Second, the proposed legislation must define the term “not of a serious nature.” Without a definition, the referral of complaints is susceptible to subjectivity and abuse. Third, as recommended by the LeSage Report, a written acknowledgement indicating that the complainant was informed of the complaint process should be obtained prior to engaging in informal discussions.¹⁰ Fourth, Bill 103 does not specify the person who will facilitate the mediation. In an attempt to level the power inequity, the mediator should be a neutral party with no ties to the police. Fifth, complainants should have more than 30 days to make a decision whether they want to ask the IPRD to review the decision to resolve the matter informally. Sixth, statistics

¹⁰ LeSage Report, p.67.

should be maintained regarding the numbers and outcomes of informal resolution. Finally, the IPRD should be obligated to provide legal advice and representation to complainants in acknowledgement of the resource imbalance between complainants and the police.

Recommendations:

- Amend section 66(4) so the IPRD, not the chief of police, suggests the use of informal resolution.
- A written acknowledgement indicating that the complainant was informed of the complaint process should be obtained prior to engaging in informal discussions.
- Provide a definition of the term “not of a serious nature.”
- Employ neutral mediators without any ties to the police to conduct mediations.
- Amend section 66(6) to extend the amount of time from 30 to 120 days in which complainants must decide whether they wish to ask the IPRD to review the decision to resolve the matter informally.
- Require the recording of statistics respecting the numbers and outcomes of informal resolution.
- Oblige the IPRD to provide legal advice and representation to complainants.

Expunging Employment Records

Sections 66(11), 69(13) and 76(12) permit the expunging of a police officer’s employment record two years after an entry is made about misconduct or unsatisfactory work performance if informal resolution was not achieved and if there have been so subsequent entries regarding misconduct or unsatisfactory work performance.

Given the fact that there was either a misconduct or unsatisfactory work performance by an officer, the PPAO does not agree that entries to an officer’s employment record should be expunged after such a short period of time. The retention of this information is important to discern any trends about the officer’s problematic behaviour. Therefore, it is recommended that these records be expunged after five year’s time.

Recommendation:

- Extend the time from two to five years in which entries to a police officer’s employment record respecting misconduct or unsatisfactory work experience is expunged by changing sections 66(11), 69(13), 76(12).

HEARINGS AND DECISIONS

The standard of proof for hearings must be proved on “clear and convincing evidence,” according to section 84 of Bill 103. The PPAO believes that this is a very high standard of proof and should be replaced with the “balance of probabilities” standard. Otherwise, situations may arise where an officer is found to have engaged in misconduct in a civil

proceeding (where the standard of proof is only a balance of probabilities) but the complaint was unsubstantiated by the Ontario Civilian Police Commission.

Transparency is fundamental to a viable complaints system. One way of achieving transparency is to make hearing decisions available to the public. While section 86(1) sets out such a requirement, it is qualified by the statement that decisions be made available in the manner that the chief of police “considers appropriate in the circumstances.” The PPAO feels this limitation gives too much discretion to the chief of police and allows him or her to act as a gatekeeper of information.

That being said, it is acknowledged that some complaints will involve information of a sensitive nature and complainants may not want their personal information available to the public. Thus, the PPAO recommends that, at the request of the complainant, the name and identifying information of the complainant be anonymized. Hearings should also be held “in camera,” at the request of the complainant only, to protect personal information and prevent possible intimidation.

Complainants will often not have the financial or social resources to obtain assistance at hearings although police officers will be able to receive help from their police service. To level the playing field, legal advice and legal representation should be provided to alleged victims.

Recommendations:

- Substitute the term “clear and convincing evidence” with “balance of probabilities” in section 84.
- Make all hearing decisions available to the public by deleting the phrase “in the manner that he or she (the chief of police) considers appropriate in the circumstances” in section 86(1).
- Include a provision permitting the anonymization of the complainant’s name and identifying information in decisions.
- Permit hearings to be held “in camera” at the request of the complainant.
- Provide legal advice and legal representation to complainants.

RIGHT OF APPEAL

Pursuant to section 88(1), Bill 103 restricts appeals to the Divisional Court to only particular decisions made by deputy chiefs and chiefs of police. The PPAO strongly disagrees with this limitation. To ensure accountability and transparency, we believe that any decision heard by the Commission should be appealable to the Divisional Court.

Turning to section 88(2), it states “an appeal may be made on a question that is not a question of fact alone, from a penalty imposed or from any other action taken, or all of them.” This provision is poorly drafted and ambiguous. It is not clear whether the grounds for appeal must be based on a question of law, a question of fact and law or a question of either fact or law. The PPAO recommends the standard of review be a question of either fact or law.

Recommendations:

- Revise section 88(1) by allowing all decisions of the Commission to be appealed to the Divisional Court.
- Clarify section 88(2) to state that an appeal to Divisional Court may be made on either a question of fact or law.

PERFORMANCE AUDITS

The PPAO is pleased the IPRD can compel boards to submit to performance audits at any time as per section 91 and the IPRD can conduct periodic performance audits of its own administration of complaints made by members of the public, as per section 92. To further increase accountability, both boards and the IPRD should be required to undergo performance audits at regular intervals and they should be made available to the public.

Recommendations:

- Amend section 91 to say that performance audits of boards are required annually and the results made available to the public.
- Amend section 92 to say that performance audits of the IPRD are required annually with respect to its administration of complaints made by members of the public.

OFFICE OF THE OMBUDSMAN

The rights of persons making complaints would be better protected with the additional oversight of the Office of the Ombudsman. However, section 97 explicitly prevents the *Ombudsman Act* from applying to Bill 103.

Andre Marin, the Ombudsman of Ontario and former director of the Special Investigations Unit, has spoken eloquently about the dangers of not permitting the Ombudsman to have jurisdiction over police complaints:

I have a question regarding Bill 103, however, which should be of equal concern to both the police, members of the public and everyone in this room: *quis custodiet ipsos custodiet* or who will guard the guards themselves? Who can the police or the public turn to if someone is dissatisfied with the delicate decisions this government body will make regarding complaints against the police?

.....

Suffice it to say, the Independent Police Review Director will have vast, exceptional powers and reach into the police domain. The Director can decide to investigate systemic issues and make recommendations that could, in theory, tell Chiefs and Police Service Boards how to do their jobs. Life as an Ontario police officer will never be the same again. But, I put it to you, who will guard the guard themselves? Given that the Bill blesses the Director with wide ranging judicial immunities, who will keep this new provincial body in check and independently investigate complaints against it?

.....

The penultimate section, section 97, is a particularly troublesome provision. It specifically provides that the Ombudsman is to be prevented from overseeing how this government body conducts its business of investigating complaints. This is dangerous territory to venture onto and goes beyond what the Lesage report recommended. This, in my view, is a grave flaw that must be addressed and corrected.

.....

Astoundingly, as Bill 103 reads, we will be left alone among the provinces in letting the civilian review of police complaints operate without external accountability for the administrative decisions made by these bodies. Whereas British Columbia and Newfoundland have police complaints commissions entirely independent of government, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick and Nova Scotia all have commissions to some degree similar to the one proposed by Bill 103 with one big difference. Although they are set up as independent government bodies, all are subject to the independent review of their provincial Ombudsman. Having invested so much time, energy and resources to develop, we shouldn't settle for a second-class accountability structure for this newly created powerful body.¹¹

The PPAO agrees with the assertions made by Mr. Marin. Thus, the PPAO recommends that the Ombudsman have jurisdiction over the police complaints process.

Recommendation:

- Amend section 97 to enable the *Ombudsman Act* to apply to the *Police Services Act*.

OFFENCES

No person shall or attempt to harass, coerce or intimidate any other person in relation to a complaint, according to section 79(1) of Bill 103. Contravention of the provisions relating to misconduct is also an offence, as per section 81(3). The penalty provision for such offences upon conviction is a fine of not more than \$2,000 or imprisonment for not more than one year, or both. Sections 79(4) and 81(4) require the consent of the Attorney General to institute prosecutions.

The PPAO welcomes the addition of section 79(1) to the proposed legislation. However, we believe the penalties in sections 79(3) and 81(3) should be stricter to reflect the seriousness of breaching the legislation. For example, instead of being liable of a fine not more than \$2,000 upon conviction of an offence, we submit that the fine be increased to \$25,000.

The PPAO is puzzled by the inclusion of sections 79(4) and 81(4). It infers that the police complaints process is politicized and subject to the directives of the Attorney General. This additional requirement also creates another barrier for complainants who are trying to enforce their legislative rights and discourages the pursuit of prosecutions.

¹¹ *Quis custodiet ipsos custodios (who will guard the guards themselves?)*, Keynote Address to the Toronto Police Services Board, May 16, 2006, http://www.ombudsman.on.ca/UploadFiles/File/PDF/TPSBSpeech_May132006.pdf.

Recommendations:

- Increase the maximum fine for contravening the legislation in sections 79(3) and 81(3) from \$2,000 to \$25,000.
- Omit sections 79(4) and 81(4) respecting the necessary to obtain the consent of the Attorney General to institute a prosecution for offences.

POLICE IDENTIFICATION

To initiate a complaint, complainants must provide some information about the police officers who are the subject of the complaint. This usually represents an obstacle to complainants. Some clients have difficulties remembering the four or five digit badge number of the officer, especially if they are agitated. It can also be problematic for clients to report sufficient details about an officer's physical description because officers may look indistinguishable in their uniform and hats. Despite the fact that officers should provide their name and badge number upon request, PPAO clients have reported that this is often not the case. Moreover, many complainants are too intimidated to ask officers at the time of the incident for identification for fear of continued inappropriate behaviour or later reprisals. Without accurate information, it proves challenging to resolve a complaint.

The need for nametags was recognized by both the LeSage Report and various police forces across the province. The LeSage Report recommended that provincial standards ensure all officers are readily identifiable by way of a sufficiently large name patch on uniforms.¹² Several police forces, including the Toronto Police Service, now require officers to wear nametags.

Nevertheless, Bill 103 does not create a positive obligation for officers to use nametags. The PPAO recommends that the legislation oblige police officers to wear visible nametags as it will heighten accountability.

Recommendation:

- Create a requirement that police officers are obligated to wear nametags of a sufficient size to ensure they are readily identifiable.

REVIEW OF THE LEGISLATION

Bill 103 does not mandate a review of the implementation and effectiveness of the changes resulting from the legislation. The PPAO believes it is crucial to review the status of the new legislation in a timely manner. Given the importance of police complaints, a review must be conducted to prevent the perpetuation of any problematic provisions. The PPAO proposes that an initial two-year interval is appropriate with subsequent reviews every three years thereafter. Reviews must also include consultations with stakeholders.

¹² LeSage Report, p.68.

In order to produce non-partisan reviews, the PPAO thinks that the person responsible for the reviews should be an Executive Council appointment. Reports arising from reviews should be prepared within 120 days of the review date. To ensure transparency and accountability, reports should be presented to the Legislative Assembly and made available to the public.

Recommendations:

- Include a section in the legislation requiring an initial review of the implementation and effectiveness of the changes to the complaint system within two years of the effective date and every three years thereafter.
- Stipulate that the person responsible for undertaking such reviews be chosen by the Executive Council.
- Require that the legislative reviews involve consultations with stakeholders.
- Reports resulting from reviews be completed within 120 days of the review date and presented to the Legislative Assembly and made available to the public forthwith.

CONCLUSION

The Psychiatric Patient Advocate Office is pleased that the government is changing the province's police complaints system. However, there are many flaws with the proposed system under Bill 103, most notably the failure to establish a truly independent civilian body. This is extremely disappointing given the input from Ontarians and the resulting LeSage Report.

We encourage the Standing Committee on Justice Policy to consider our recommendations and to implement them to strengthen the police complaints process and bring justice to those who are most marginalized. Such measures will ensure the protection of all Ontarians.